

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH BRISKA and U.S. POSTAL SERVICE,
AIRPORT MAIL CENTER, Denver, CO

*Docket No. 99-282; Submitted on the Record;
Issued April 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay after October 15, 1993.

On September 28, 1993 appellant, then a 42-year-old mailhandler, was pushing a postal cart with a steering problem when he let go of the cart while going around it. The cart ran into the back of his left heel, compressing his foot. He filed a claim for compression strain from heel to toe.

In a September 30, 1993 duty status report, Dr. Mark Durant, a podiatrist, indicated that appellant had a fracture of the left calcaneus. Dr. Durant indicated that appellant was unable to perform any work, including sitting, standing and walking. He reported that appellant was advised to resume work effective November 23, 1993. Dr. Durant noted that his next examination of appellant was scheduled for October 22, 1993.

The employing establishment sent to Dr. Durant an October 15, 1993 memorandum, which described a light-duty job for appellant, indicating that appellant may answer the telephone, in the secretary's office, with his foot elevated as needed. In response, Dr. Durant stated, "Patient [appellant] may have light-duty position which allows him to sit for his shift. [Appellant] should be allowed to elevate left foot as needed. [Appellant] to be reevaluated next week." The employing establishment offered the position to appellant. In an October 16, 1993 response, appellant declined the position, citing his continual and constant pain.

Appellant submitted a December 7, 1993 report from Dr. S. Bert Kasven, a podiatrist, who noted that appellant appeared to have minimal healing of the fracture and, in fact, appeared to have a wider separation of the actual fractured segment of the bone. Dr. Kasven recommended surgery. He commented that the nonunion of the bone and the sustaining of the injury in September would result in surgery being performed in the near future. Dr. Kasven noted that appellant would lose more time from work and would have considerable pain.

In a January 3, 1994 decision, the Office denied appellant's claim for continuation of pay after October 15, 1994 on the grounds that there was a lack of medical evidence to support his absence from work because of total disability related to his September 28, 1993 employment injury.

In a December 30, 1994 letter, appellant, through his representative, requested reconsideration. He submitted in support of his request an undated note from Dr. Kasven who stated that appellant was totally incapacitated for duty from September 28, 1993 until March 28, 1994. He indicated that appellant was unable to perform light duty during that time. In a March 7, 1994 merit decision, the Office denied appellant's request for modification of the prior decision.

In a March 7, 1996 letter, appellant again requested reconsideration. He submitted several documents in support of his request, including a September 30, 1993 note from Dr. Durant who indicated that appellant had a fracture of the anterior lateral process of the left calcaneus. He stated that appellant was to be off work for 45 days.

In an October 17, 1996 decision, the Office denied appellant's request for reconsideration as untimely and lacking clear evidence of error. Appellant appealed the decision to the Board. The Director of the Office filed a motion to remand, acknowledging that appellant's request for reconsideration was timely filed. He indicated that, upon remand, appellant would receive reconsideration under the proper standard. In a June 18, 1997 order, the Board granted the motion to remand.¹

In a July 15, 1997 merit decision, the Office denied appellant's request for modification of the prior decision.

In a July 15, 1998 letter, appellant again requested reconsideration. He submitted several documents in support of his request, including a July 13, 1998 affidavit from Dr. Durant. He indicated that he had examined appellant on September 30, 1993 and reported that he was totally disabled for work. Dr. Durant noted that he had indicated that appellant should be off work for 45 days, until November 16, 1993. He also noted that he would next examine appellant on October 22, 1993. Dr. Durant related that he had indicated on the duty status report that appellant was to do no lifting, sitting, standing, walking, bending, stooping or other activities until he examined appellant again. He related that, in mid-October, he was contacted by an official at the employing establishment who sent to him a light-duty assignment that was to be offered to appellant. Dr. Durant stated that he submitted a response, which was not intended to be a release of appellant at that time. He noted that he reexamined appellant on October 22, 1993 and indicated that he should be reexamined in November before any decision was made on his return to work. Dr. Durant indicated that he moved at the end of October 1993 and transferred appellant's case to Dr. Kasven.

In a July 16, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and, therefore, insufficient to warrant

¹ Docket No. 97-1001 (order remanding case issued June 18, 1997).

review of the prior decision. In an accompanying memorandum, a senior Office claims examiner reviewed Dr. Durant's affidavit and stated that he found Dr. Durant's argument to be of diminished probative value when compared to the contemporaneous evidence of record. He noted that Dr. Durant's opinion of the work release was provided four years after the incident. He also found that sequence of events unlikely, stating that the employing establishment would not have submitted a job offer unless appellant had received a work release.

The Board finds that the Office improperly denied appellant's claim for continuation of pay.

The Office's decision denying appellant's request for reconsideration was set forth on the grounds that the evidence submitted was repetitious and, therefore, insufficient to warrant a review on the merits of the claim. However, in the memorandum accompanying the decision, the Office claims examiner indicated that he had reviewed Dr. Durant's affidavit and found it to have diminished probative value. In determining the weight or the probative value of medical evidence, the claims examiner was, in effect, performing a merit review of appellant's claim based on the new medical evidence submitted by Dr. Durant. The Office, therefore, in actuality, conducted a merit review of appellant's case. The Board thus has merit jurisdiction over this case.

The Office found that appellant was not entitled to continuation of pay after October 15, 1993 on the grounds that appellant had refused a light-duty job offered by the employing establishment which his attending physician, Dr. Durant, had approved. The regulation relating to termination of continuation of pay states:

"Where pay is continued after an employee stops work due to a disabling traumatic injury, such pay shall be terminated if:"

* * *

"(3) The employing [establishment] receives evidence that the attending physician has found the employee to be partially disabled and the employee has refused suitable work which has been offered by the [employing establishment] in accordance with section 10.207 or fails to respond to such offer within five work days of the receipt of such offer...."²

In this case, the Office regarded the undated note of Dr. Durant, indicating that appellant could perform a position, in which he sat all day answering the telephone, as evidence that he found appellant to be partially disabled. However, in the September 30, 1993 duty status report, Dr. Durant had indicated that appellant could not return to work until November 16, 1993. The Office, therefore, at that time, had conflicting evidence on when appellant would be considered partially disabled and, therefore, would be able to perform light-duty work. The contemporaneous evidence of record was inconsistent and could not definitively support a

² 20 C.F.R. § 10.204(a)(3).

finding that appellant could perform a light-duty position as of October 16, 1993. The Office had not developed the record to clarify Dr. Durant's apparently conflicting statements. The subsequent evidence submitted by Dr. Durant clearly shows, as reflected in his September 30, 1993 office note, that he intended to keep appellant off work at least 45 days. Dr. Durant's affidavit further shows that, in response to the Office's communication, he approved the offered position for appellant but did not intend to have him released for work at that time. A review of Dr. Durant's statement does not show any definite statement that appellant was released to perform the light-duty position offered to appellant at the time it was offered to him. The Office, therefore, did not have sufficient medical evidence to establish that Dr. Durant had found appellant to be partially disabled effective October 16, 1993 and was, therefore, able to perform light-duty work. The offer of work to appellant was premature and invalid. The case will, therefore, be returned to the Office for the appropriate changes to appellant's records to reflect that he was entitled to continuation of pay after October 15, 1993.

The decision of the Office of Workers' Compensation Programs, dated July 16, 1998, is hereby reversed.

Dated, Washington, D.C.
April 6, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member